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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 899.

WILLIAM COLE,

Petitioner,

vs.

DOOR COUNTY MEMORIAL HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals, Eighth Appellate District of Ohio.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

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OPINIONS BELOW.

The Municipal Court of Cleveland rendered no opinion.

The opinion of the Court of Appeals for the Eighth Appellate District of Ohio is not reported and is set forth in the Appendix hereto at page 7 together with the Mandate of the Supreme Court of Ohio overruling the Defendant-Appellant's motion to review the decision of the Court of Appeals and the judgment of the Court of Appeals that are set forth on pages 9-10 hereof.

JURISDICTION.

Is based upon the provisions of Title 28 U. S. C. A. Sec. 1257 (3) and Title 46 U. S. C. A. Sec. 601.

QUESTION PRESENTED.

May an American seaman's wages be arrested or attached in garnishment proceedings even tho the judgment against the seaman covers medical expenses in behalf of his wife and minor child?

THE STATUTE INVOLVED.

"Attachment or Arrestment of Wages; Support of Seaman's Wife."

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children. Mar. 4, 1915, c. 153, Sec. 12, 38 Stat. 1169."

Title 46, U. S. C. A. Sec. 601.

Originally enacted in one section in 1872, the statute was amended in 1915 by the addition of the words beginning with "Provided."

The first section of 1872 has been interpreted by this Court in *Wilder vs. Inter-Island Steam Navigation Company*, 211 U. S. 239 and has never been modified.

The effect of the second section, beginning with the word "Provided" is the sole question before the Court for decision.

STATEMENT OF THE CASE.

In a garnishment proceeding, the Door County Memorial Hospital of Sturgeon Bay, Wisconsin, in the Municipal Court of Cleveland, Ohio, recovered a judgment of $378.29 against one William Cole, a seaman in the employ of the Tomlinson Fleet Corporation that operates a fleet of ore carriers on the Great Lakes. The judgment covered the amount of the hospital's charge for treatment of the seaman's wife and child.

The judgment debtor, seaman Cole, appealed that part of the judgment concerning the garnishment order. The Court of Appeals for the Eighth Appellate District of Ohio affirmed the Municipal Court. The Supreme Court of Ohio within its discretion refused to review the Appellate Court's decision in a Motion To Certify The Record of the Court of Appeals. Hence, as the Supreme Court of Ohio refused to exercise its discretionary power of review, the petition prays that the Writ for Certiorari be directed to the Court of Appeals of the Eighth Ohio Appellate District.

REASON FOR GRANTING THE WRIT.

This is the first and only case on record sustaining garnishment of a seaman's wages that we can find in the maritime history of the United States. The decision of the Court of Appeals of Ohio is in direct conflict with the provisions for the Protection of Seamen contained in Title 46 U. S. C. A. Sec. 601 and therefore the question involved would appear to be of general and highly important interest not only to seamen, but to the shipping industry of the entire nation. At this posture of the case the law of the State of Ohio permits arrestment, attachment, garnishment of a seaman's wages. For time out of mind, such

arrestment has been prohibited by the general maritime law. The law of the sea is the measure of maritime rights and obligations.

ARGUMENT.

The provisions of the quoted statute have been considered in two jurisdictions—the only cases to be found on the subject.

In *Cunningham vs. McCullough,* Misc. 1940, 22 N. Y. S. 2d 739, the Court held:

> "On motion under Civil Procedure Act N. Y. Sec. 894, providing for order permitting or directing person indebted to pay debt to sheriff or judgment creditor injunctive proceedings would be vacated, where wages of seaman were involved, and judgment, altho apparently for board and lodging of daughter of a seaman was not an order by any court regarding the payment of any part of his wages for the support of his wife and minor children, within this section, 'since section refers to orders such as may be made in matrimonial action or by Court having jurisdiction to make similar orders, such as Domestic Relations Court of City of New York.' U. S. C. A. Title 46, Sec. 601, p. 375."

Again, in *Avilla vs. Avilla* (1947) 183 P. 2d 668, in considering the attempted attachment, attachment of a seaman's wages, the Court held that an order incorporated in a decree of divorce, for example, as distinguished from attachment proceedings and the like, is such an order that permits execution.

Hence it seems clear that a *judgment,* as entered in the instant case, is distinguished from an *order* such is contemplated in the amendment to the original statute.

Obviously no such order is involved herein.

If "any court" in *garnishment* proceedings, as herein, may order a judgment paid, the first section of Title 46, U. S. C. A. Sec. 601 prohibiting garnishment is a nullity and may as well be repealed.

If Congress in the amendment of 1915 had intended to modify the injunction against arrestment of wages, surely the simple and logical procedure would have been to word the amendment:

> "Nothing in the foregoing shall apply to the garishment or arrestment of seaman's wages in cases involving the support and maintenance of a seaman's wife and minor children."

But instead, Congress provided for an *order* of a court.

> "As a general rule judgments are to be distinguished from orders or rules; one does not include the other."
>
> 11 Ohio App. 410.

The entry of the Municipal Court in the instant case is as follows:

> "Parties in court: Trial had: Court finds and renders judgment for plaintiff against defendant for $378.24. Attachment sustained: garnishee ordered to pay into court amount sufficient to satisfy judgment and costs."

Surely a unique entry. No court is empowered to render more than a judgment. But the Court, intrigued by the word "order" in the statute, makes an order as to whom the proceeds of the judgment must be paid. Obviously this was for the purpose of circumventing the provisions of the first section of the statute. But the "order" is made in a *garnishment* proceeding, which is strictly prohibited.

It is submitted that the law as promulgated by the Statute and interpreted by the Supreme Court still pro-

hibits attachment or garnishment of a seaman's wages, in spite of the provision for the validity of an *order* of the court in cases of support for a seaman's wife and children.

That the Petition should be granted is respectfully submitted.

LUCIAN Y. RAY,
Counsel for Petitioner.

RUSSELL V. BLEECKER,
WILLIAM F. STEINER.
Of Counsel.

APPENDIX.

JUDGMENT OF THE MUNICIPAL COURT.

Mar. 7, 1960:

The Court finds that there is due pltff. from deft. the sum of $378.24; that there is property (money) attached herein, wherefore it is ordered that attachment be sustained and that pltff. recover said sum of $378.24 out of property (money) attached herein and also costs of suit.

FRANK T. KELLY, BAILIFF.

J. KILCOYNE, *Deputy*.

OPINION OF THE COURT OF APPEALS.

HUNSICKER, J.

William Cole, Sr., employed as a seaman by Tomlinson Fleet Corporation, was sued by Door County Memorial Hospital of Sturgeon Bay, Wisconsin, in the Municipal Court of Cleveland, Cuyahoga County, Ohio, for hospital and medical services rendered his wife and minor child. Attachment of the wages of Mr. Cole was made by service upon Tomlinson Fleet Corporation, his employer. A judgment was rendered against Cole for the medical and hospital service rendered his wife and children and an order was issued to his employer to pay the money to the court.

It is from the order to pay into court the wages of Mr. Cole held by Tomlinson Fleet Corporation that an appeal is now before us. Mr. Cole says the trial court was without authority to issue an order against his wages as a seaman.

To sustain the contention of Mr. Cole there is cited to us 46 U. S. C. A., Section 601, which reads as follows:

> "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any

previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the *support and maintenance* (Emphasis ours) of his wife and minor children."

It is to be noted that the last sentence of this section as above quoted in *effect* gives to a court authority to make an "order" against a seaman's wages for the "support and maintenance of his wife and minor children." It does not matter whether such order is made direct against the seaman or to his employed, as in the case before us. *Avilla v. Avilla*, 183 P. 2d 668; *Michenheim v. Cathcart*, 84 So. 2d 449; 56 *A. L. R.*, Wages of Seaman, 628.

It is a part of a husband's natural obligation that he support his wife and children with the necessaries of life in accord with the station in life occupied by such family. The legal sense of the words "support" and "maintenance" is the same as the understanding of them in every day life subject to the qualification above stated.

The phrase "support and maintenance" when used with reference to persons includes medical and hospital service. 54 *C. J. S.* 905; 50 *American Jurisprudence*. Support of Persons, par. 2, page 870; and in such sense it was used in Section 601 of 46 U. S. C. A.

A debtor should not be able to avail himself of a statutory exemption to deprive his wife and minor child of medical and hospital care when such law of exemption,

with its exception provision, was designed for the protection of a wife and minor children.

We therefore determine that where a valid judgment is rendered against a seaman for medical and hospital service to his wife and minor child, an attachment of wages due the seaman may be made to enforce collection of that judgment since such medical and hospital service falls within the exception to exemption of a seaman's wage under paragraph 601 of 46 U. S. C. A. as being "support and maintenance of his wife and minor children."

The judgment herein must be affirmed.

Judgment affirmed.

DOYLE, P. J., GRIFFITH, J. Concur.

(DOYLE, P. J., HUNSICKER, J., of the Ninth District, and GRIFFITH, J., of the Seventh District, sitting by designation in the Eighth District.)

JOURNAL ENTRY OF THE COURT OF APPEALS.

December 20, 1959:

This cause came on to be heard on the appeal of questions of law from the judgment of the Municipal Court of Cleveland, and was argued by counsel for the parties; and upon consideration the court finds no error prejudicial to the appellant and therefore the judgment of the said Municipal Court of Cleveland is affirmed, and it is ordered that Appellee recover from Appellant its costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing said Municipal Court of Cleveland to carry this judgment into effect.

MANDATE OF THE SUPREME COURT OF OHIO.

March 8, 1961:

Motion for an Order Directing the Court of Appeals of Cuyahoga Cou[illegible]y to Certify its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

OPINION IN THE CASE OF CUNNINGHAM v. McCULLOUGH, 22 N. Y. S. 2d 739.

City Court of New York, New York County.

June 10, 1940.

1. Injunction.

The prevention of payment of ordinary wages by injunction under statute enjoining transfer of property by judgment debtor or third party would be improper. Civil Practice Act, § 781.

2. Exemptions.

A judgment against seaman, which was apparently for board and lodging of daughter of seeman, was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order, since statute referred to orders such as might be made in matrimonial action or by court having jurisdiction to make similar orders, such as Domestic Relations Court of the City of New York. 46 U. S. C. A. § 601.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Regarding Payment by Seaman of His Wages for Support of His Wife and Children."

3. Execution.

On motion under statute providing for order permitting or directing person indebted to pay debt to sheriff or judgment creditor, injunctive provisions of third-party subpoena would be vacated, where wages of seaman were involved, and judgment, although apparently for board and lodging of daughter of seaman, was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order. Civil Practice Act, §§ 781, 794; 46 U. S. C. A. § 601.

Supplementary proceedings by one Cunningham against one McCullough. On motion made under Section 794 of the Civil Practice Act, wherein the American Export Lines, Incorporated, was named as the third party.

Motion denied.

Michael H. Grae, of St. George, for judgment creditor.

Haight, Griffin, Deming & Gardner, of New York, for third party American Export Lines, Inc.

COLEMAN, Justice.

[1-3] The application concerns the wages of a seaman. If ordinary wages were involved, it would be improper to prevent their payment by an injunction under Section 781 of the Civil Practice Act. See D., L. & W. Coal Co. v. Kenlon, 164 Misc. 32, 297 N. Y. S. 126. And the federal statute exempting wages of seamen must also be reckoned with. 46 U. S. C., Sec. 601, 46 U. S. C. A. § 601. The judgment creditor misconstrues the last sentence of Section 601. The judgment which she obtained, although

apparently for board and lodging of a daughter of the judgment debtor, is not an "order by any court regarding the payment by any seaman of any part of his wages for the support * * * of his wife and minor children." That provision refers to orders such as might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as the Domestic Relations Court of the City of New York. Upon request of the third party the injunctive provisions of the third party subpoena dated April 1, 1940, directed to American Export Lines, Inc., are vacated. Cf. Burns v. Fred L. Davis Co., 1 Cir., 271 F. 439.

Motion made under Section 794 of the Civil Practice Act is denied.

OPINION IN THE CASE OF AVILLA V. AVILLA, 183 P. 2d 668.

Civ. 3664.

District Court of Appeal, Fourth District; California.

Aug. 13, 1947.

1. Exemptions.

The primary purpose of a statute of exemption from execution is to secure the exempted property to the use and benefit of the debtor and those dependent upon him, and as a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply.

2. Exemptions.

An order for support of divorced wife and child of commercial fisherman on the high seas incorporated in divorce decree, and order of execution on wages of the fisherman for delinquent payments of support, constituted an "order by any court" within exception of the exemption

statute, and exemption from execution was properly denied where allowance thereof would interfere with the support order. 46 U. S. C. A. § 601.

See Words and Phrases, Permanent Edition, for all other definitions of "Order of Any Court."

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge. Affirmed.

Action by Mary Avilla against Carl S. Avilla wherein a decree of divorce was entered in favor of plaintiff. From an order denying a claim of exemption from execution, defendant appeals.

Order affirmed.

Ruel Liggett, of San Diego, for appellant.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a claim of exemption by a maritime fisherman.

A decree of divorce was entered in this action in favor of the plaintiff, giving her custody of a minor child. In accordance with an agreement of the parties, incorporated in that decree the plaintiff was further awarded $150 per month for the support of herself and the child. The defendant having become delinquent in those payments to the amount of $2,639.23, and the matter having been properly presented, the court ordered an execution to issue in the amount of the delinquency.

The defendant was employed on a fishing vessel engaged in commercial fishing on the high seas. His earnings consisted of a proportionate share of the proceeds of the "catch." The execution thus issued was served upon the

captain of this fishing vessel, who responded that he was indebted to the defendant in the amount of $246.38. The defendant filed a notice and an affidavit claiming exemption under the provisions of Section 601, Title 46 U. S. C. A., in that he was earning his living by fishing on the high seas, and also claiming exemption under the provisions of Sections 690.10 and 690.11 of the Code of Civil Procedure. Thereafter, the defendant moved the court to release the money tied up by the service of this execution, on the ground of such an exemption. After a hearing, the court entered an order releasing $300 to the defendant, and denying his motion as to all amounts over that sum. From this order the defendant has taken this appeal.

This appellant contends that his earnings as a maritime fisherman constitute wages as that term is used in Section 601 of Title 46, U. S. C. A., and that the levying of the execution here in question does not constitute an "order by any court" within the meaning of the exception provided in the last sentence of Section 601. That sentence reads: "Provided, That nothing contained in this (or certain other sections) shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children."

Although the matter is open to question it will be assumed, for the purposes of this opinion, that the remuneration received by the appellant for his services as a fisherman constitutes "wages" within the meaning of Section 601. The controlling question here is whether the allowance of the exemption here claimed would "interfere" with a court order "regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children." This question must be answered in the affirmative.

[1] The primary purpose of such an exemption statute is to secure the exempted property to the use and benefit of the debtor and those dependent upon him. Holmes v. Marshall, 145 Cal. 777, 79 P. 534, 69 L. R. A. P. 104 Am. St. Rep. 86, 2 Ann. Cas. 88. As a part of that purpose a decree for alimony stands on a different basis than an ordinary debt and in such a case, unless the statute clearly provides to the contrary, the exemption will not apply Willen v. Willen, 121 Cal. App. 351, 8 P. 2d 942; Rankins v. Rankins, 52 Cal. App. 2d 231, 126 P. 2d 125; Schlaefer v. Schlaefer, 71 App. D. C. 350, 112 F. 2d 177, 130 A. L. R. 1014. In Bruton v. Tearle, 7 Cal. 2d 48, 59 P. 2d 953, 957, 106 A. L. R. 580, it is said: "We have shown that the judgment against defendant is a judgment for alimony. One of the characteristics of such a judgment is that as against said judgment the judgment debtor's earnings are not exempt from execution."

[2] Not only are those principles in accord with public policy in this regard, but the last sentence of Section 601 expressly provides that the exemption of wages contained in that section shall in no way interfere with the order of any court regarding the payment by a seaman of any part of his wages for the support of his family. The original support order was a court order within the exception provided by this statute. The order for an execution and the execution itself were also such orders. There can be no question but that to allow this exemption would "interfere" with these orders made in a divorce case for the express purpose of requiring the appellant to support his family. The situation was clearly within the exception provided in the exemption statute upon which the appellant relies, and clearly supports the court's order in refusing to give effect to that exemption. This view is supported by one of the cases relied on by the appellant. Cunning-

ham v. McCullough, City Ct. N. Y., 22 N. Y. S. 2d 739, 740. While the exemption was there upheld for the reason that the order there in question was not such an order the court, in referring to the last sentence of Section 601, said: "That provision refers to orders such as might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as the Domestic Relations Court of the City of New York."

The order appealed from is affirmed.

GRIFFIN, J., concurs.

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No. 895.

WILLIAM COLE,
Petitioner,

vs.

DOOR COUNTY MEMORIAL HOSPITAL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

HISTORY OF CASE.

On or about September 1, 1959, the Door County Memorial Hospital of Sturgeon Bay, Wisconsin, Respondant herein, but plaintiff below, filed an action in the Municipal Court of Cleveland against William Cole, Sr., Petitioner herein but defendant below, on an account for services rendered by said Hospital for and on behalf of the wife and child of said Cole, in the sum of Three Hundred Eighteen Dollars and Thirty-six Cents ($318.36).

The case was numbered A-532-331 and entitled Door County Memorial Hospital, Plaintiff v. William Cole, Sr. defendant, and with the petition the plaintiff filed an affidavit in attachment against the Tomlinson Fleet Corporation, by which it was admitted that defendant was employed at the time.

The grounds for the attachment were two:

1.—Non-residence of defendant, and

2.—Necessaries, to-wit: Hospital and medical services furnished the wife and child of defendant.

The Tomlinson Fleet Corporation, garnishee, filed an Answer on September 5, 1959, and the plaintiff filed a Motion to Strike same because said Answer did not set up what money or property of defendant it was holding, but merely put up an argument that it was not bound by said Order of Attachment, which motion was granted, November 18th, 1959, with the following entry:

"Plaintiff's motion granted—Garnishee excepts—Answer of garnishee stricken—Garnishee not party to lawsuit"—

On December 8, 1959, the Answer of Defendant was filed, setting up two defenses:

1st —That he did not owe amounts sued for, and

2nd—That he was a seaman in the United States Merchant Marine and that as such by the laws of the United States his wages were not subject to garnishment or attachment.

To this Answer, plaintiff filed a reply. The case came on for trial on February 17, 1960, and on March 21, 1960, the following entry was made:

"Parties in Court: Trial had: Court finds and renders judgment against defendant for $378.24. Attachment sustained; garnishee ordered to pay into court amount sufficient to satisfy judgment and costs."

On March 30, 1960, notice to the garnishee, that is, the Tomlinson Fleet Corporation, of judgment rendered and order entered, was served on said garnishee.

It is to this order on said garnishee that this appeal is directed, as witnessed by Assignment of Error filed in

the Court of Appeals of Cuyahoga County, Ohio therein, by Petitioner herein which reads as follows:

> "The trial court erred in sustaining the attachment of the seaman defendant's wages due from the Tomlinson Fleet Corporation, garnishee herein."

There is no claim by the Appellant that the Municipal Court erred in rendering judgment against the firm on the amount due, to-wit: Three Hundred Seventy-eight Dollars and Twenty-four Cents ($378.24), with interest and costs.

I should like to call the Court's attention to the fact that it is only the order in attachment that is appealed from, not the judgment.

Plaintiff-appellee, Respondent herein filed its brief in the Court of Appeals, in answer to the original Brief and Assignments of Error filed by the defendant-appellant Petitioner herein on March 23, 1960.

Hearing was had before the Court of Appeals on December 14, 1960, and on December 22, 1960, the Court of Appeals handed down its decision, affirming the judgment of the Municipal Court, according to Journal Entry set forth on page 9 of Appendix in Petitioner's Petition, and rendered its opinion, which is shown on page 7 of Appendix in Petitioner's Petition.

From this decision and opinion of the Court of Appeals, the Petitioner on January 11, 1961 filed his motion in the Supreme Court of Ohio to order the Court of Appeals to certify its record, which motion after filing of brief and argument on March 6, 1961 was overruled by said Supreme Court of Ohio as appears on page 10 of appendix in Petitioner's Petition.

ARGUMENT AND LAW.

Now, as to the question that the Petitioner is raising hereto, to the effect that the Tomlinson Fleet Corporation is not bound by the order in attachment issued out of the Municipal Court of Cleveland and served upon it, because the defendant Cole, at the time of the service of said order in attachment, was a seaman on a vessel sailing the Great Lakes and employed by said Tomlinson Fleet Corporation, counsel for Respondent contends that it is improperly before this Court at this time, and could not be raised without the garnishee, the Tomlinson Fleet Corporation being in court, but since it has been brought in and will be brought in if this action is ever properly brought, I will only refer to it in passing.

This action was brought under the following section of the Revised Code of Ohio, Sec. 2715.01—Grounds of Attachment:

> "In a civil action for the recovery of money at or after its commencement the plaintiff may have an attachment against the property of the defendant upon any one of the following grounds:
>
> (b) That the defendant is not a resident of this State.
>
> (k) That the claim is for work or labor or for necessaries."

The affidavit in attachment was brought upon these two grounds, to-wit: The defendant is not a resident of this state and the action is for necessaries, to-wit: Medical and hospital services furnished the wife and minor child of Defendant-appellant, Cole.

The order of attachment was made and served upon the garnishee in this case under Rev. Code Secs. 2715.30. 2715.29:

"The garnishee is required to answer concerning money or credits in its possession or under its control or owing to debtor from the time of the service in attachment upon it and to hold same subject to the order of the court until further order or final disposition of the case."

Is there anything in the Code or in law cited under it allowing for exceptions either to an employer of a Merchant seaman or anybody else under the jurisdiction of the court so they do not have to answer and hold funds in their possession when an order of garnishment is served upon them? If, so, this counsel for Respondent would be delighted to see the same.

The attorney for the Petitioner has cited a number of cases, but not one concerning these statutory laws of the State of Ohio, and would this court be justified in setting all these statutes aside, declaring them null, void and of no effect because the defendant happens to be in the employ of a corporation existing and doing business in the City of Cleveland, Ohio, and under the jurisdiction of the Municipal Court thereof?

The Petitioner's contention is based upon a Federal statute of 1874, which declared no wages accruing to a seaman shall be subject to attachment or garnishment and a ruling of the Supreme Court in 1908 upheld the same, but the statute and the supporting cases were passed and decided prior to the enactment in 1915 of the Federal statute, which is now 46 U. S. C. A. Sec. 601, which reads as follows:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment

thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen; *Provided*. That nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the *support* and *maintenance of his wife and minor children.*" Mar. 4, 1915. c. 153, Secs. 12.38. Stat. 1169.

The Respondent contends that this order served upon the garnishee in the case at bar comes squarely within the provisions of the Federal statute as being an order by any court (Municipal Court of Cleveland) regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and children.

Certainly an order of the Municipal Court for the payment of a portion of Petitioner's wages into court for support and maintenance of his wife and minor child comes squarely within the provisions of this statute. The Municipal Court of Cleveland so held, which is the first decision, I believe, that has ever been made on this subject in the State of Ohio.

Because the attorney for the Petitioner has cited only two cases interpreting the above quoted statute since the amendment thereto was adopted in 1915, these are the only two which counsel for Respondent will concern himself, to-wit: *Avila v. Avila*, 183 P. 2nd, 668, and *Cunningham v. McCullough*, 22 N. Y. S. 2d 739.

The case of *Avila v. Avila*, cited on the third page of defendant-appellee's brief is where a divorced wife tried to hold a seaman's wages on a decree for alimony for herself and children after same had been reduced to judgment. The court held same as alimony as distinguished

from an ordinary debt, but an execution was issued upon the judgment in the alimony award and his wages were held under said order and the debtor filed his motion to have them declared exempt under Sec. 601 of Title 46 U. S. C. A., which request the court refused and was sustained by the Court of Appeals.

This is actually the situation at bar except that this is an order of attachment issued upon the ground that the same are for *necessaries furnished defendant's wife and child*, instead of a judgment based on a decree for alimony.

The case of *Cunningham v. McCullough* seems to be authority that injunctive provisions of third-party subpoena would be vacated where wages of a seaman are involved, although apparently for board and lodging of a daughter of a seaman, as the same was not a court order regarding the payment by any seaman for the support of his wife and children, although based upon a judgment by plaintiff against defendant debtor for support of his said wife and children. However, this case is authority to the effect that if such order had been made by a court, it could be enforced against the wages of a seaman, such as orders that might be made in a matrimonial action or by a court having jurisdiction to make similar orders, such as Domestic Relations Court of the City of New York.

The counsel for Respondent has to confess ignorance of what the injunctive provisions of third-party subpoena could possibly be in the above case cited. This is certainly not equivalent to an order issued by the Municipal Court of Cleveland to pay money into court on an order for the support of wife and minor child of Petitioner.

So nothing has been shown to prevent the working of the amendment to the Federal statute above quoted to the effect that an order of Municipal Court of Cleveland upon the garnishee herein served upon the same should not

bind whatever money the Petitioner had in the possession of said garnishee until final disposition of the case, and the same should be paid into court upon service of the order upon it by the court to that effect.

CONCLUSION.

Counsel for Petitioner is seeking to avoid the effect of the amendment of 1915 to the statute of 1874 before quoted, providing that nothing contained therein should interfere with the order of any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children, by denying that the judgment of the Municipal Court, which is the subject of this action, constitutes such an order. But certainly an order of attachment based on a claim for care and medical treatment of the wife and baby of defendant can be nothing else, and counsel for Petitioner knows this because the one assignment of error he alleges in his appeal to the Court of Appeals, is not the rendition of the judgment, but that the trial court erred in sustaining the attachment of the seaman defendant's wages, due upon the Tomlinson Fleet Corporation, garnishee herein.

Certainly you cannot have an attachment without an order—that is what was done in this case—the decree of attachment constitutes an order.

When the case was filed, the order of attachment was issued and served upon the garnishee and when the judgment was rendered, the order of attachment was sustained and served upon the garnishee to pay the money into court.

Everything was regular and according to law, the procedure of the Municipal Court has been affirmed by the Court of Appeals and the Supreme Court of Ohio, and no grounds for appealing same has been shown and the same

should be allowed to stand and a mandate issued to carry the same into effect.

Respectfully submitted,

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